

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

Petition of Pac-West Telecomm, Inc.  
for Declaratory Ruling Regarding Access  
Charges Assessed on VoIP Traffic

WCB Docket No. 11-115

**REPLY COMMENTS OF PAC-WEST TELECOMM, INC.  
ON ITS PETITION FOR DECLARATORY RULING REGARDING  
ACCESS CHARGES ASSESSED ON VOIP-INITIATED ACCESS TRAFFIC**

Pursuant to 47 C.F.R. § 1.2, the Public Notice released on July 7, 2011, and the June 17, 2011 letter from Mr. Alexander P. Starr, Division Chief, Market Disputes Resolution Division, Enforcement Bureau, to counsel for MCI Communications Services, Inc. d/b/a Verizon Business Services (“Verizon”) and Pac-West Telecomm, Inc. (“Pac-West”),<sup>1</sup> Pac-West respectfully submits these reply comments in support of its petition for declaratory ruling in connection with the primary jurisdiction referral from the United States District Court for the Eastern District of California, Case No. 1:10-cv-01051-OWW-GSA.

**I. VERIZON AND AT&T IGNORE THE SCOPE OF THE COMMISSION’S  
DIRECTIVE TO PAC-WEST TO FILE A PETITION CONCERNING  
WHETHER TARIFFED ACCESS CHARGES CAN APPLY TO VOIP TRAFFIC**

As a threshold matter, Verizon’s opposition improperly recasts this matter into a fact-specific inquiry that skips over the legal issue the Commission sought to resolve through Pac-

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<sup>1</sup> See Public Notice, *Pleading Cycle Established for Comments on Pac-West Telecomm, Inc. and Verizon Petitions for Declaratory Ruling*, WC Docket No. 11-115 (July 7, 2011); the June 17, 2011 letter from Mr. Starr will be referred to as “Letter Ruling.”

West's petition. Pac-West will make the requisite factual showing at the appropriate time, but the Commission did not direct Pac-West to do so at this stage of the referral. Verizon's focus on factual issues in how local exchange carriers handle VoIP-originated traffic is a tacit acknowledgement that, as a matter of law, tariffed access charges are owed on VoIP-originated 8YY traffic just as they are owed when those same calls begin in the traditional "TDM" call format.

Pursuant to the Commission's Letter Ruling, Pac-West was directed to file a petition for a declaratory ruling on one of five issues referred to the Commission by the court, namely, whether Pac-West's tariffed rates can, as a matter of law, be applied to "traffic that originates or terminates in Internet Protocol format ('VoIP')." <sup>2</sup> As the Letter Ruling explained, once Pac-West's assigned legal issue and the legal issue assigned to Verizon concerning Pac-West's pre-June 2010 federal switched access tariff were resolved upon the "issuance of Commission orders addressing the parties' petitions for declaratory ruling, the parties and Commission staff will reconvene to determine ... how best to achieve a Commission resolution of [the remaining] issues." <sup>3</sup> In other words, the Commission first sought to resolve the two threshold legal issues separating the parties before proceeding to the three remaining issues that require the application of the law to the unique facts of this referral.

Verizon and AT&T Inc. ("AT&T"), however, argue that Pac-West was required at this stage of the referral to file a Section 208 complaint against itself and prove not only the legal issue that the Commission directed Pac-West to address, but also prove all of the underlying

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<sup>2</sup> Letter Ruling at 2.

<sup>3</sup> *Id.*

facts that demonstrate it is actually providing the services defined in its tariff.<sup>4</sup> Indeed, much like Verizon's attempt to rely on the inapposite *All-American Order*<sup>5</sup> to challenge Pac-West's tariff in its parallel petition in this docket, Verizon now seeks to rely on the similarly irrelevant *YMax Order*<sup>6</sup> in its bid to continue receiving free service from Pac-West. But as even Verizon acknowledges, that case was resolved after AT&T initiated a formal complaint against YMax, and after the Commission had developed a complete record on "*YMax's switched access tariff and the particular facts of the service that YMax was providing.*"<sup>7</sup>

Verizon's invitation to dismiss Pac-West's petition is therefore largely predicated on unsubstantiated factual allegations about Pac-West's network and how Pac-West provides service to its customers – information Verizon has told the court it has *not* received.<sup>8</sup> The Commission should therefore disregard Verizon's advocacy based on Verizon's factual

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<sup>4</sup> See, e.g., Comments of AT&T Inc. at 2, 4 ("in order to collect the 'tariffed access-service charges' it demands, Pac-West must establish that it is actually providing the access services described in its tariff.... Pac-West has failed to ... explain how those services are the 'functional equivalent' of the service provided by the competing ILEC."); Comments of Verizon at 10 ("Pac-West also makes no showing that, for the traffic at issue, it 'assess[es] or collect[s] fees or charges associated with the Universal Service Fund ('USF') ... [or] End User Common Line ('EUCL') charges.' Nor does Pac-West make a showing that any of the traffic at issue is originated by end user customers that pay Pac-West for any local service that Pac-West provides.").

<sup>5</sup> *All American Telephone Co. Tariff F.C.C. No. 3*, Order, 25 FCC Rcd. 5661 (Pricing Policy Div. 2010) ("*All American Order*").

<sup>6</sup> *AT&T Corp. v. YMax Commc'ns Corp.*, Memorandum Opinion and Order, 26 FCC Rcd. 5742 (2011) ("*YMax Order*").

<sup>7</sup> Verizon Comments at 4. As Pac-West explained in its petition, if Verizon sought to challenge its liability under Pac-West's tariff, it is required by the Commission's rules to initiate a complaint just as AT&T did against YMax, not simply refuse to pay for the services it is indisputably receiving. Petition at 6 n.8.

<sup>8</sup> *Pac-West Telecomm, Inc. v. MCI Commc'ns Servs., Inc.*, Joint Statement Re Discovery Disagreements, Dkt. No. 56, Case No. 1:10-cv-01051-OWW-GSA (E.D. Cal) (Verizon asserts to the court that it has not received discovery concerning, among other topics, documents concerning the identity of Pac-West's end users, Pac-West's invoices to and contracts with its end users, the switching equipment employed to deliver Verizon's traffic, the end offices through which Verizon's traffic is switched and routed, and the local exchange circuits furnished by Pac-West).

suppositions.<sup>9</sup> Accordingly, at this stage of the referral, as directed by the Commission, Pac-West seeks a declaration from the Commission that the access charge regime has always applied to the access services a LEC provides to an IXC when handling that IXC's 8YY traffic, even when the customer initiates the call in VoIP format. As shown below, Verizon's backpedaling on factual issues highlight its concession on the ultimate legal issue raised by Pac-West's petition.

## **II. THE COMMISSION'S FINDING THAT VOIP TRAFFIC TERMINATING ON THE PSTN IS "TELECOMMUNICATIONS" TRAFFIC IS FATAL TO VERIZON'S CLAIM THAT TARIFFED ACCESS CHARGES ARE INAPPLICABLE TO VOIP-INITIATED 8YY CALLS**

Verizon does not dispute – because it cannot – that the Commission has already determined that VoIP traffic terminating on the PSTN is “telecommunications.”<sup>10</sup> Verizon also does not dispute that the Commission's rules define access services as “services and facilities provided for the *origination* or termination of *any* interstate or foreign *telecommunication*.”<sup>11</sup> Verizon further does not dispute that Pac-West originates Verizon's 8YY calls onto the PSTN because Verizon and the intermediate ILEC refuse to accept any traffic in IP format, such that Pac-West is required to convert Verizon's calls to TDM prior to delivering the traffic to the tandem provider through which Verizon has chosen to receive its calls from Pac-West.<sup>12</sup> And Verizon does not dispute that the Commission has already determined that 8YY traffic is access traffic.<sup>13</sup> Pac-West therefore provides “exchange access” under the Act as it offers its “facilities

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<sup>9</sup> See *In the Matter of Shareholders of Hispanic Broadcasting Corp.*, 18 FCC Rcd. 18834, ¶ 29 (2003) (ignoring allegations not supported by record evidence, affidavits or sworn testimony).

<sup>10</sup> Pac-West Petition at 8-9.

<sup>11</sup> 47 C.F.R. § 69.2(b).

<sup>12</sup> Verizon Comments at 12.

<sup>13</sup> See Pac-West Petition at 6 n.7.

for the purpose of the origination ... of telephone toll service.”<sup>14</sup> As a result, pursuant to Commission Rules 69.1(b) and 69.106(a), Pac-West is not only entitled, but *required*, to assess tariffed access charges on Verizon when Pac-West originates telecommunications onto the PSTN on Verizon’s and its 8YY customers’ behalf.<sup>15</sup> This case is that simple.

Verizon nevertheless seeks to evade its responsibility to compensate Pac-West for its tariffed access services because the telecommunications traffic at issue here “undergoes a net protocol conversion.”<sup>16</sup> “Telecommunications” is, by definition, however, “the transmission, between or among points specified by the user, of information of the user’s choosing, *without change in form or content of the information as sent and received*.”<sup>17</sup> When the Commission classified IP-to-PSTN traffic as “telecommunications” traffic, it must have necessarily determined that the protocol conversion inherent in such a communication was irrelevant, because it could not otherwise claim that such a communication was “without change in form or content of the information as sent and received.” IP-to-PSTN traffic is “sent” in IP format but “received” in TDM format, such that the term “form and content” must mean something other than the protocol format(s) of a given communication for the Commission’s classification of IP-to-PSTN traffic as “telecommunications” traffic to withstand scrutiny.<sup>18</sup> As a result, Verizon’s

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<sup>14</sup> 47 U.S.C. § 153(16).

<sup>15</sup> Rule 69.1(b) provides that “charges for such access service ***shall be*** computed, ***assessed, and collected*** and revenues from such charges shall be distributed as provided in this part.” 47 C.F.R. § 69.1(b) (emphasis added). Rule 69.106 further provides that “charges that are expressed in dollars and cents per access minute of use ***shall be assessed by local exchange carriers*** that are not subject to price cap regulation ***upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign services***.” 47 C.F.R. § 69.106(a) (emphasis added). Pac-West is also required to assess a database query charge pursuant to Rule 69.118.

<sup>16</sup> Verizon Comments at 15.

<sup>17</sup> 47 U.S.C. § 153(43) (emphasis added).

<sup>18</sup> As Pac-West explained in its petition, the Commission has always allowed LECs to collect their tariffed access charges for the access services they perform for calls that originate in

reliance on the net protocol conversion that takes place in an IP-to-PSTN call to absolve it of its responsibility under the access charge regime is entirely meritless.

Moreover, Verizon paradoxically attempts to invoke an exemption from access charges despite the fact that Verizon does *nothing* to convert the format of the call, but instead insists on receiving the call from Pac-West in the same TDM format as all of its other 8YY traffic, for which it does not deny its duty to pay access charges. Verizon's proposal for IXC's to provide *no* compensation to LECs that do *more* work has no support in the Commission's law, and Verizon certainly cites none. The Commission's access-charge exemption for information-service providers has nothing to do with undisputed telecommunications carriers like Verizon that only accept traffic in TDM format in any event. As explained below, the exemption was designed to promote the growth of information services, not provide a windfall to legacy interexchange carriers.

Verizon asserts that Pac-West cannot collect access charges because its customers relevant here are themselves Enhanced Service Providers ("ESPs").<sup>19</sup> Even if this characterization were true, however, it does not help Verizon. For the purpose of access charges, the Commission has long held that ESPs, such as VoIP providers, procure access to the PSTN as LECs' end users. In 1983, when the Commission first adopted its access-charge regime, it determined that all providers of interstate service that rely on local exchange services to reach local subscribers, including then-nascent ESPs, should pay their fair share of costs. The Commission thus created "a single, uniform and nondiscriminatory structure for interstate access

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numerous formats. For example, wireless-originated calls begin in packet-based formats and then enter the PSTN through LEC networks, but when IXC's like Verizon deliver such traffic for termination through least-cost-routing arrangements, they do not claim they are somehow exempt from access charges. The result should be no different here.

<sup>19</sup> Verizon Comments at 17.

tariffs covering those services that make identical or similar use of access facilities.”<sup>20</sup>

As the Commission explained in the *MTS/WATS Recon Order*, “[o]ur intent was to apply these carrier’s carrier charges to interexchange carriers, and to all resellers and enhanced service providers.”<sup>21</sup> But in that order, however, the Commission created the “ESP Exemption,” ruling that, for purposes of access charges, LECs should treat ESPs as end users eligible to receive service from the LECs’ local business lines, instead of being required to pay LECs’ tariffed switched access rates.<sup>22</sup> Although the Commission intended the ESP Exemption to be temporary, it has never been revoked and therefore remains in place today.<sup>23</sup> Thus, the fact that a LEC provides local exchange service to a VoIP provider, rather than a large enterprise customer whose line-side facilities can also be entirely VoIP-based, is a distinction without a difference. Under the Commission’s rules, both entities are the LEC’s end users that send telecommunications to the LEC to originate onto the PSTN and then pass the call to the IXC responsible for payment.

Accordingly, the Commission should declare that Verizon’s excuses for why it doesn’t

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<sup>20</sup> *MTS and WATS Market Structure*, Third Report and Order, 93 F.C.C. 2d 241, ¶ 24 (1982).

<sup>21</sup> *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 F.C.C. 2d 682, ¶ 76 (1983) (*MTS/WATS Recon Order*).

<sup>22</sup> *MTS/WATS Recon Order* at ¶ 83; *Access Charge Reform*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd. 21354 ¶ 285 (“ESPs may purchase services from incumbent LECs under the same intrastate tariffs available to end users, by paying business line rates and the appropriate subscriber line charge, rather than interstate access rates.”).

<sup>23</sup> *MTS/WATS Recon Order* at ¶ 83, 90; *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 FCC Rcd. 15982, ¶¶ 343-348 (1997); *id.* at ¶ 344 (“ESPs should remain classified as end users”); *see also ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 409 (D.C. Cir. 2002) (FCC did not “directly exempt[] ESPs from ... access charges” but “defined them as ‘end users.’”); *Nw. Bell Tel. Co. Petition for a Declaratory Ruling*, 2 FCC Rcd. 5986, 5988 ¶ 21 (1987), *vacated as moot*, 7 FCC Rcd. 5644, ¶ 1 (1992) (explaining that the exemption is the ESP’s, not the carriers’).

have to pay Pac-West's tariffed access charges are just that: excuses. The access charge regime has always applied when Pac-West carries a VoIP-initiated 8YY call to its appropriate switch, performs the necessary SMS/8YY database query to identify the responsible IXC, here Verizon, and then switches and carries that call to the appropriate destination in accordance with that IXC's instructions supplied in the RESPORG. Verizon's efforts to take a free ride on Pac-West's network based on irrelevant technical details that are not even true by the time Pac-West hands the call off in TDM format should be rejected for the rank opportunism that motivates them.

### **III. THE INTERCARRIER COMPENSATION SYSTEM IS BROKEN BECAUSE CARRIERS LIKE VERIZON HAVE DECIDED TO FLOUT THE COMMISSION'S TARIFF SYSTEM**

When Congress opened the local exchange market to competition in 1996, the express purpose was to "promote competition" and "encourage the rapid deployment of new telecommunications technologies."<sup>24</sup> Similarly, the Commission has made it its goal to eliminate "disincentives to migrate to all-IP networks."<sup>25</sup> As the commenters in support of Pac-West's petition demonstrate, Verizon is deliberately undermining this goal of deploying IP-telecommunications technologies by refusing to pay any intercarrier compensation once a carrier begins sending Verizon any traffic that originates in IP format.<sup>26</sup> As a result, the Hobson's

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<sup>24</sup> Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act").

<sup>25</sup> *A National Broadband Plan for Our Future*, GN Docket No. 09-51, at 142.

<sup>26</sup> See Comments of COMPTTEL at 4 (noting that denying the relief requested by Pac-West in its petition "would also discourage carriers from modernizing their networks and slow the deployment of broadband facilities and IP-based services contrary to the objectives of the National Broadband Plan."); Comment of Cox Communications, Inc. and Midcontinent Communications at 1 (Verizon's strategy is part of a broader campaign "to stop paying access charges in violation of its obligations under tariff and applicable state and federal law."); Comments of the NCTA at 3 ("If Verizon suspects that a provider has any VoIP traffic at all,



choice facing LECs today is whether they shun modern telecommunications consumers and continue operating a high-cost, antiquated network like the RBOCs to be assured that they will be compensated for the costs they incur on behalf of other carriers, or upgrade their networks to provide 21<sup>st</sup> Century functionality to their customers with the risk that the nation's largest IXCs will pay them nothing until a court awards them a judgment many years later or they acquiesce to the IXC's demand that the carrier take the below-cost rate of \$0.0007.

Recent comments filed by Verizon demonstrate that Verizon's self-help campaign is not a principled effort, but simply a calculated cost-savings strategy. In response to *tw telecom inc.*'s petition for declaratory ruling on direct IP-to-IP interconnection rights, Verizon stated that "given the ubiquity of TDM in the PSTN today, granting the TWTC Petition would simply serve to shift onto ILECs nearly 100 percent of the cost of converting traffic from IP to TDM, or *vice versa*. Currently, the IP service provider bears those costs."<sup>27</sup>

Here, by contrast, Verizon not only wants to shift the cost of the IP-to-TDM conversion onto Pac-West (which Pac-West does not charge Verizon for in any case), but also the local switching, database query, transport and routing costs that Pac-West must incur in order to deliver *Verizon's* toll-free subscribers their calls, for which Verizon has been pocketing all of its 8YY revenues despite relying on the necessary access and related database-query services provided by Pac-West as a necessary input. As explained in Pac-West's petition, common carriers, such as Pac-West, are obligated to carry this traffic and are precluded from recovering charges from the person making the toll-free call, which is exactly what makes the call "toll free." Thus, toll-free service is, by definition, a "called party pays" service, whereby the

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Verizon has refused to pay access charges on all of the provider's traffic, *including non-VoIP traffic that originates and terminates as TDM.*") (emphasis in original).

<sup>27</sup> Comments of Verizon and Verizon Wireless, *tw telecom inc. Petition for Declaratory Ruling Regarding Direct IP-to-IP Interconnection*, Docket No. 11-119, at 11.

responsible IXC announces to all other carriers that it will pay the LECs' access charges associated with bringing those calls to the retail customer.<sup>28</sup> Based on the Commission's rules and policy, this is true regardless of the technical format in which a particular toll-free call is initiated.<sup>29</sup>

Accordingly, if the Commission desires to fix the intercarrier system, it can take a step in that direction by declaring that its rules mean what they say: 8YY calls initiated in IP format are "telecommunications" subject to the Commission's tariff regime. Any other outcome would simply reward Verizon for its unlawful self-help campaign and undermine the Commission's stated objective of removing "disincentives to migrate to all-IP networks."

#### IV. CONCLUSION

For all these reasons, the Commission should grant the relief requested by Pac-West in its petition and declare that tariffed access charges, and related database query charges, apply to interexchange IP-to-PSTN 8YY traffic that is delivered by a LEC for termination on the PSTN to an IXC's 8YY customer.

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<sup>28</sup> See 47 C.F.R. § 52.101(f) (with respect to 8YY calls, "the toll charges for completed calls are paid by the toll free subscriber."); See also *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923 at ¶ 11 n.17 (2001) ("*Seventh Report and Order*") ("The Commission noted that, in some case, such as 800 and 888 service, the called party, which pays for the call, is unable to influence the calling party's choice of provider for originating access services.") (citation omitted).

<sup>29</sup> *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, ¶¶ 48, 49 (1997) ("competitively neutral rules will ensure that ... disparities are minimized so that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of potential service providers.").

Dated: August 23, 2011

Respectfully submitted,

/s/

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## **CERTIFICATE OF SERVICE**

I, Edilma Carr, hereby certify that on this 23<sup>rd</sup> day of August 2011, a true and correct copy of the foregoing **REPLY COMMENTS OF PAC-WEST TELECOMM, INC. ON ITS PETITION FOR DECLARATORY RULING REGARDING ACCESS CHARGES ASSESSED ON VOIP-INITIATED ACCESS TRAFFIC** was filed via hand delivery and/or electronic mail, as indicated below, to the following persons:

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